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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL RENTERIA,

Defendant and Appellant.

B272041

(Los Angeles County
Super. Ct. No. TA136346)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura R. Walton, Judge. Affirmed.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Renteria (defendant) appeals from his conviction of two counts of attempted murder. He contends that the trial court abused its discretion in denying his motion for new trial resulting in a denial of his right to due process. As we find no denial of due process, we affirm the judgment.

BACKGROUND

In a five-count information, defendant was charged with two counts of attempted willful, deliberate, and premeditated murder in violation of Penal Code sections 187, subdivision (a), and 664¹ (counts 1 and 2); two counts of possession of a firearm by a felon in violation of section 29800, subdivision (a)(1) (counts 3 and 4); and possession of an assault weapon in violation of section 30605, subdivision (a) (count 5). The information alleged as to counts 1 and 2 that defendant personally and intentionally used and discharged a firearm in the commission of the offenses, causing great bodily injury within the meaning of section 12022.53, subdivisions (b), (c), and (d). Pursuant to 186.22, subdivision (b)(1), it was alleged as to all counts that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. The information further alleged that defendant suffered two prior prison terms within the meaning of section 667.5, subdivision (b).

A jury found defendant guilty as charged and found true the firearm and gang allegations. Defendant waived a jury trial on the prior prison term allegations, and in a bifurcated court trial, the court found one to be true.

On June 30, 2015, defendant filed a motion for new trial based on a claim of abuse of discretion in allowing victim Juan

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

Madrigal's preliminary hearing testimony, and on the ground of newly discovered evidence. After hearing the testimony of five witness and the argument of counsel, the trial court denied defendant's motion for a new trial, and on May 5, 2016, sentenced defendant to a total prison term of 80 years to life. Defendant was ordered to pay mandatory fines and fees, and given combined presentence custody credit of 934 days.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The shooting

Jose Madrigal (Jose)² was a member of the Lynwood area Whitmore Street gang. On the afternoon of August 23, 2013, Jose was on Virginia Avenue in Lynwood with his brother Juan and three friends. One of the friends was a member of the "FBA" gang. A pickup truck approached the group with the driver's window down, and the driver "banged" or "hit up" on them by saying "Where are you from?" Jose's friends "claimed" their neighborhood by replying that they were from FBA. The driver immediately began shooting toward them with a semiautomatic handgun while yelling "Compitas," the name of a Lynwood gang. Frightened, all but one of the friends ran away. A bullet struck Jose in the leg, and Juan was struck by two bullets, one in the head and one in the ankle.

Though Juan was called to testify, after a series of inaudible responses, the trial court ruled that Juan was not competent to testify, and his preliminary hearing testimony was instead read to the jury. He testified that the driver of a truck

² As the two victims in this case are brothers with the same surname, we refer to them and other members of their family by their first names to avoid confusion.

issued a gang related challenge, “Where are you from?” He then heard gunshots and “just went blind.”

Witnesses identify defendant and his truck

At the preliminary hearing Juan identified defendant in court as the driver of the truck that day. At first Juan claimed that he went blind before seeing the driver, and that his identification was based on descriptions given to him by others. When pressed, Juan admitted he was looking right at the driver when the driver said, “Where are you from?” He also admitted that his in-court identification was based upon his observation of the driver at the time.

Jose testified that the shooter was driving a gray “4 by 4” Chevy Silverado truck that sat high, with 24-inch shiny rims, two large front doors, and two small back doors. Jose maintained that the truck was gray, although he had told police officers after the shooting that the truck was tan. He identified the photograph of defendant’s truck (exh. 16) as the same truck driven by the shooter. He described the shooter as Hispanic, male, mid-20’s, with a light complexion, and wearing a black T-shirt. Although he had told officers that he would recognize the shooter if he saw him again, he made no identification and testified that he did not recognize defendant. Jose acknowledged that if he were to identify the shooter his life would be in danger from other gang members. Jose, who had been sentenced to prison for carjacking, was in protective housing.

Deputy Sheriff Grant Roth testified that he interviewed witnesses at the crime scene shortly after the shooting. Jose described the shooter’s truck as a tan Chevy Silverado pickup with an extended cab. Deputy Alexander Perez who also interviewed witnesses at the scene, testified that Jose told him he would be able to identify the shooter, and described him as Hispanic, in his 20’s, with a light complexion, mustache, and

black shirt, driving a tan, four-door Silverado. Deputy Perez observed that it is often difficult to obtain cooperation from victims who are gang members, because they fear possible retaliation if labeled a “snitch.”

Alicia Carlos (Carlos) testified that she was looking out her window on Virginia Avenue at about 3:30 p.m. on the day of the shooting when she saw the truck stop in the middle of the street about two houses down from her. She then saw the driver fire about eight shots out the window. Initially she testified that there were no bars on the windows and no obstructions between her and the truck, which was about 27 feet away. When she was shown photographs of the house, however, she testified that all the windows in the house had bars, that she could not remember whether the curtains were open or closed, and that the truck was further away than 27 feet.

Carlos described the truck as raised, beige, tan, or brownish, with two doors. She told an officer she thought it had four doors, but may have been mistaken about that, as well as thinking the truck was raised. It was a normal truck. Carlos claimed not to recognize defendant’s truck when shown the photograph at trial. However, she also testified that a few months after the shooting, when the investigating detective showed her the same photograph, she identified the truck as the one she saw at the scene. Carlos explained that she meant to say that it was similar, but not the same truck, but she was nervous.

Carlos testified that although the driver’s window was all the way down, she saw only the side half of the shooter’s face from about 45 feet away. She described the shooter as short, with black hair, a flat nose, and a large body type, weighing maybe 200 pounds. She remembered telling detectives that he was male, Hispanic, in his mid-20’s and wearing a black shirt. She circled defendant’s photograph in a photographic lineup, and

she identified defendant in court at trial as the person depicted in the photo array. At the preliminary hearing, Carlos testified that she was 100 percent certain that the photograph depicted the shooter, saying, "I'm never gonna forget that face."

When Deputy Perez spoke to Carlos soon after the shooting, she told him she had been standing in her front yard when she witnessed the shooting, and described the shooter as male, Hispanic, mid-20's, light-skinned, with a mustache, and wearing a black shirt. She also said she would be able to identify the shooter. She never said she saw only half his face. Carlos did not know the make or model of the truck, but said that it was a tan, four-door truck with stock rims.

Juliana Bravo (Bravo), testified that she was on the Virginia Avenue sidewalk when she heard shooting, turned, and saw a newer-looking brownish or greenish Silverado truck and a man on the ground bleeding. She called for an ambulance. She thought the truck depicted in exhibit 16 looked like the truck she saw, but it was not the same color. At the preliminary hearing Bravo testified that the truck was a brownish-greenish king cab truck, meaning that it had a front and back seat, but she did not know whether it had four doors. Deputy Perez had also spoken to Bravo the day of the shooting when she told him that she was in her front yard when she witnessed the shooting, and described the truck as a tan or brownish four-door Chevy Silverado.

Deputy Jason Puga testified that he had been called to the scene of the shooting, learned that the shooter was thought to be a member of the Compitas gang, and obtained a description of the shooter and his truck. In January 2014, Deputy Puga observed such a truck in the driveway of defendant's house on Redwood Avenue. He explained that he stopped near the house to speak with a couple in a car which had its hazard lights on. Defendant came out of his house into the yard, telling Deputy Puga that

they were his parents, to leave them alone, while also shouting profanities at the deputy. After the parents said they were okay, Deputy Puga left and contacted Detective Grant Roth, to whom Deputy Puga gave the address, defendant's name, and vehicle registration information for further investigation. Detective Roth was able to find a photograph of defendant and of his truck.

Gang evidence

The prosecution's gang evidence established that defendant, an active member of the Compitas gang, had been convicted of a gang related offense with other gang members in 2011. In May 2008, defendant admitted to Deputy Juan Quezada that he was a member of the Compitas gang, with the moniker "Fat Boy." Deputy Quezada testified that it was common for gang members to commit crimes with other gang members. During a traffic stop in February 2009, defendant admitted to Deputy Chad Sessman that he was a member of the Compitas gang, and that his moniker was Fat Boy. In June 2010 Sergeant Oscar Veloz noted defendant's height as five feet, his weight as 220 pounds, and his date of birth as October 15, 1987, when defendant admitted his membership in the gang to the sergeant.

In response to a hypothetical question mirroring the facts in evidence, the prosecution's gang expert Carolina Roman, gave her opinion that the crime was committed for benefit of the Compitas gang.

Defense evidence

Defendant's brother Vicente Renteria, Jr. (Vicente Jr.), testified that he was a heavy equipment operator for Bali Construction at the time of the shooting. Defendant had come to Vicente Jr.'s workplace on August 23, 2013, to have lunch, and afterward, they went together to the employer's office so defendant could fill out an employment application and undergo a drug test. Vicente Jr. testified that they arrived about 2:30

p.m., defendant filled out the paperwork, and they went together for the drug test. He claimed that defendant arrived at the workplace in his second car, an Impala, as the Silverado truck had been in the body shop since August 17 for repair of the damage caused when someone hit it on the side. Vicente Jr. claimed that the truck had always been silver. He also claimed that the truck remained in the body shop for about two weeks, because the entire truck had been painted, including the bed liner. Vicente Jr. testified that the entire truck was first sprayed black, and then painted silver, the same color it had been. Defendant paid \$1,200 cash for the repairs and repainting.

Vicente Jr. claimed defendant was with him at 3:00 p.m. on August 23, 2013, and that it was not possible that defendant's truck was on the streets at that time. Vicente Jr. admittedly never told law enforcement about this alibi evidence, and gave his first statement on the topic three days prior to his testimony. Vicente Jr. denied that defendant was, or had ever been a gang member.

Defendant's father, Vicente Renteria, Sr., testified that as a favor to his son, he had taken defendant's truck to the body shop on August 17, 2013, because his wife had scratched it on the right side. Defendant retrieved his truck on August 27.

Miguel Jiminez, the owner of a South Gate body shop, testified that exhibit H was an invoice from his shop, which showed defendant's truck came in on August 17, 2013, and was picked up August 27, 2013. The invoice also contained defendant's name, the truck's license plate number (75328G1), make, model, and color -- silver, and that the rear bumper was repaired and the truck painted, for \$1,200, paid in cash.

The defendant also presented two expert witnesses: Dr. Mitchell Eisen, an expert on eyewitness memory and suggestibility; and Martin Flores, a gang expert. Flores testified

that the Compitas gang had only 20 members, of which only about eight were active gang members. He testified that the Compitas gang was subject to Mexican Mafia gang rules, including one prohibiting drive-by shootings, and mandating that any shooting must be done as a “walk-up.” Any drive-by shooter could be “greenlighted” for gang punishment consisting of either a tax or physical assault. Flores was of the opinion that defendant was no longer an active member of the gang, based upon his review of defendant’s employment history and the absence of interaction with law enforcement for a time, as well as the absence of recent photographs, gang indicia, or any gang tattoos.

Rebuttal

Deputy Samuel Paul explained the Citywide Surveillance System used by the Sheriff’s Department, including a feature which automatically recognizes, captures, and stores license plate data. Using the system’s database, Detective Brandon Patin entered the license plate number 75328G1 (defendant’s truck) to search for photographs of vehicles with that number in the system. His search resulted in exhibit 36, which includes a photograph of the license plate taken on August 19, 2013. In addition to a time stamp, the document contains the closest address corresponding to the location of the camera which captured the image: the photograph was taken just after midnight on Alameda Street in Compton, and contains a partial view of the vehicle, which appears to be a pickup truck. Other photographs captured the license during the daytime on August 28 and September 10, 2013. They show a silver truck resembling defendant’s.

Defendant’s motion for new trial

Three weeks after the verdicts, on the day set for the bifurcated trial on defendant’s prior conviction, defense counsel

informed the court that new evidence had come to light regarding third-party culpability, and asked the court to appoint an investigator.³ Defendant filed his motion for new trial the following month, and the trial court heard the testimony of five witnesses over two days in October 2015, and March 2016.

Evidence in support of motion

Abril Hernandez (Hernandez) testified about her sister having been in a two year relationship with Joey Alvarado (Alvarado) until September 8, 2015, when he stabbed and nearly killed her. Alvarado fled and has not been found. In an April or May 2015, conversation between Alvarado and Hernandez, Alvarado said a detective had been looking for him and had left a card with his mother, but he was afraid to call because he shot someone in 2013. He added, "But my friend's being -- he'll probably get charged for it. And I feel bad for it because I did it." He named defendant as the friend. Alvarado spoke about the shooting at least three more times. Hernandez testified that Alvarado was a member of the Compitas gang and had gang related tattoos. Also, though he formerly owned a Chevy Silverado, Alvarado was afraid that the detectives could find him, so he got rid of it. Alvarado's Silverado was a metallic brown color that sometimes looked gray, and had shiny 26-inch rims, which he sold before letting go of the truck.

Hernandez first told police about Alvarado's confession in September (when Alvarado stabbed her sister) even though she had an opportunity to do so when her sister left him, after police were called due to his violence. Alvarado was then hospitalized with a mental health hold. Hernandez did not know how the defense investigator learned about her, as she had only told her

³ The defense also requested contact information for the prosecution's trial witnesses, Carlos and Jose. The court appointed an investigator, but the discovery motion was denied.

mother and husband about Alvarado's disclosures. Hernandez provided a statement to the defense investigator about Alvarado's comments after Detective Giles expressed more interest in this case than Hernandez's sister's stabbing.

Eric Loza (Loza) testified that defendant, Vicente Jr., and Alvarado were his friends. Loza and defendant were close and had known each other since fifth grade. They had known Alvarado since 2000, when they were in middle school. Alvarado was a member of the Little Compitas gang, and would bring his fellow gang members around, but Loza denied that he and defendant were gang members. Loza did not know that defendant had been charged in the present case until sometime in 2015. He had last spoken to Alvarado in May 2015, when Alvarado admitted having committed the shooting on August 23, 2013.⁴

Loza admitted that he had already learned about Alvarado from defendant's sister, Olivia, about six weeks before their May 2015 encounter. Olivia had told him that Alvarado was the actual shooter, though before that, Loza had heard rumors that Alvarado was the perpetrator. Loza explained he did not go to the police because he was afraid of Alvarado, afraid for his life.

⁴ The May meeting occurred when Loza saw Alvarado driving his gray Silverado with the big chrome rims. They pulled over and spoke. Alvarado asked whether Loza had heard about "that shit," and what was up with defendant. When Loza asked what he was talking about, Alvarado said, "I blasted some fools" on Virginia Street in Lynwood. On cross-examination, Loza testified that Alvarado did not tell him the date of the shooting, only the place. He then admitted that Alvarado did *not* mention the street or place of the shooting, and did not mention defendant.

Loza did not instigate contact with defendant's family, rather they contacted him. Loza first spoke to the defense investigator in July 2015 after being contacted by Olivia and Vicente Jr. The interview, arranged by Olivia, took place at defendant's home while Olivia and defendant's other sister were present. Loza did not tell the investigator that Olivia had told him about Alvarado's involvement. Loza could not remember whether he told the investigator that Alvarado was a Compitas member.

Witness Herold Noel (Noel), a surgeon who practiced medicine in Africa and Haiti, but manufactured generic medicines in Long Beach, testified about the events he observed on August 23, 2013: He turned right onto Virginia Avenue from Long Beach Boulevard, when he saw a commotion. People were running. He saw a pickup truck right in front of his car, and he heard gunshots. He saw the hand of the driver of the truck out the window firing at people. Someone was running toward the truck, and gunfire was coming from both sides. A woman and two men jumped onto the front of his car, and another person rolled over and damaged his side view mirror, which he wanted the person responsible to fix. Noel thought it was the shooter's fault that people were running into his mirror, so he followed the pickup truck, writing down the truck's license plate as he drove. He followed it to Redwood Avenue, where the driver parked, got out, placed something in the back seat of the truck, and went into the nearby house. The driver soon came out, walked to the dead end of the street, and then placed his hands around his mouth and screamed as though calling someone. After a few minutes the man walked back, saw Noel's car, and made a shooting gesture by pointing his index finger toward Noel with his thumb in the air. Noel backed up and returned to the scene of the

shooting. Noel claimed that he was not afraid, because he was a Christian and did what was right.

Noel described the driver-shooter as a male Hispanic, mid-20's, clean-shaven except for a mustache on each side of lips, wearing khaki pants, long socks, and a light white shirt. He also identified a photograph.

When Noel returned to scene of the shooting he tried to speak to a police officer, but when the officer said, "Get the fuck out of here." Noel replied, "Really?" Noel felt disrespected and left. The next day, Noel returned to Redwood Avenue but did not see the truck. He walked to the end of the street where the man had screamed, and found a woman watering. As he explained about the damage to his car, he heard a female voice yell, "Mom, don't talk to him." He did not tell the woman that he had seen a shooting, only that he was looking for the man who lived on the corner in the house with the white fence, where he had seen the truck, because the man had damaged his mirror. He gave her his contact information. No one answered when he knocked at the door of the other house. Noel never called the police and he left the country two days later.

In mid-August 2015, Noel saw the woman with whom he had left his contact information. She approached him at an ATM, asked whether he was Dr. Noel, and said, "My son is in jail. And you know who did the shooting." The defense investigator thereafter contacted him and they spoke in August and in October. In August, Noel gave the investigator the license plate number of the truck. He told the investigator in October that he had seen the shooter's photograph on television news. Still, he did not call the police, because it was none of his business.

Defense investigator Edward Shore (Shore) testified that he interviewed Loza in July 2015, after a meeting was arranged by defendant's family. Loza's demeanor was evasive,

apprehensive, and frightened. He was afraid of Alvarado, and he did not want to go to court to testify. Loza never said where the shooting took place, or whether it was day or night.

In August, Shore spoke to Noel, who gave him a manila envelope on which he wrote the truck's license plate number and noted, "Mexican guy" and "Chev 4 doors." Noel said that he did not recognize the shooter when shown photographs of defendant. Instead, Noel identified the photograph of Alvarado as the driver of the truck he followed. Shore showed Noel photographs of two trucks. Noel did not recognize the photograph (exh. N) depicting a truck similar to defendant's truck. The photograph of the truck later identified as belonging to Alvarado, was a black-and-white photograph of shiny pickup truck with chrome rims and four doors, with the outside door handles evident on all four doors. Noel said that it resembled the truck he saw on the day of the shooting.

Noel told Shore that he went to defendant's house after the shooting and an older Hispanic woman answered his knock. Shore later identified the woman as defendant's mother. Noel said that he had trouble communicating with her due to a language barrier, and he left when someone inside said, "Go away, we got nothing . . . to say to you." Two days later, Noel returned to the same house, and left his name and telephone number. He told Shore that he did that because his mirror had been broken by the suspect's car on the day of the shooting, and he wanted to have it fixed.

Hernandez's sister, Jennifer Orozco, testified that in September 2015, Alvarado tried to kill her. He then absconded, and his whereabouts were unknown. Orozco was acquainted with defendant and his brother. Defendant and Alvarado were friends and neighbors at the time of the shooting.

Orozco recounted a telephone call she received from Alvarado in August 2013, in which he said, "I just shot some fools." He said that he was driving his truck on Virginia Avenue, saw three or four people, and hit two of them, one in the head. He said he was alone and would walk to his friend Michael's house, which was on the same block as Alvarado's. Later in her testimony Orozco admitted that she did not ask who he was with when he committed the shooting. When he called her after the shooting, she asked, "Who you with?" He replied, "I'm by myself." Alvarado called her a second time, about 20-30 minutes after the first call. He said he had to get rid of the gun and was driving back to work in his truck.

Detective Giles interviewed Orozco shortly after Alvarado had stabbed her, and told her that defendant had been convicted of attempted murder. Detective Giles questioned her about the shooting just as she came out of the ICU after surgery. Orozco thought she was under the influence of morphine at the time, as she was sleepy and dizzy. She did not recall telling Detective Giles that Alvarado was with defendant, or that they went together to shoot those "fools."

On cross-examination, Orozco admitted telling Detective Giles that Alvarado and defendant were together, saw the enemy, went to get a gun, and then went back to shoot them, but she claimed this was not the truth, because Alvarado told her he was by himself. What she meant to say was that Alvarado walked to defendant's house and they got into defendant's truck, so that defendant could take Alvarado to work. Orozco believed that defendant's truck was at defendant's home that day, not in a shop, but they could have gone in defendant's other car. Orozco claimed that because of the medication she also misspoke when she told Detective Giles that the shooting took place on Josephine Street, which is just a block away from Virginia Avenue.

Alvarado told her in February 2014 that defendant was in jail, and that he was afraid that “they” would come after him. She did not go to the police because she was afraid of Alvarado; he was violent, always threatening to kill her. Alvarado was a Compitas gang member, but Orozco did not think that defendant was a member of the gang.

Orozco identified a photograph of Alvarado’s truck and described it as brown or gray, with 26 inch rims. Orozco told Detective Giles that Alvarado returned his truck to the dealer in May 2015. She explained that Alvarado knew that defendant had been charged, detectives had been to his house, and he and was afraid that someone would recognize his truck. Alvarado had taken the rims off the truck about six months earlier for the same reason.

Prosecution’s opposition

Noel testified that he gave the envelope with notations to the defense investigator in 2015, before seeing Alvarado on television in September 2015. He testified that he did not go to the police, explaining that he did not want to be a victim of the police as a black man in the United States, and that he knew what the sheriffs could do to a person who went against them. He did not give the envelope to the police, because the police were worse than gang members, especially at that time, and he did not want to place his life in danger. He added, “The Sheriff’s Department, if you are against them, they will come after you”; and, “As a black person in LA, I feel -- when I see a sheriff, I feel like same as my son as a marine when he had the Taliban in his back.”

Noel then testified that he *did* call the Sheriff’s station the same day as the shooting, and explained the situation to the woman who answered. She told him that he would be connected to the gang unit, or that someone would get back to him. Though

he gave his name, phone number, and the date of the shooting, no one ever called back. Noel claimed that when he saw Alvarado's photograph on television news two years later, he immediately called the Sheriff's Department again, left his name and phone number, but no one ever got back to him. He called twice, selected the voicemail option from a recorded message, and left his name, phone number, and a brief explanation of his reason for calling.

Noel identified defendant's mother in the courtroom audience as the woman he spoke with the second day after the shooting in front of her house. Noel denied knocking on her front door. He admitted that he had trouble communicating with her that day. Later in his testimony, Noel explained that he first spoke to her in English, but switched to Spanish when she did not understand. He did not tell her he had seen a shooting. He told her only that he wanted to talk to her about a man who had parked his truck at the corner, at the house with the white picket fence. He gave her his cell phone number, name, and address.

Noel recognized her when he encountered defendant's mother at a Lynwood bank sometime in 2015. She approached, told him about her son's situation and that he was in jail for something he did not do, but she did not say that it was about the shooting. Noel told her he could probably talk to her, but not at that time, and she asked him to speak to an investigator about the man he saw park on the corner. Although he had never told her that he had seen the shooting or knew who the shooter was, she seemed to believe he knew the identity of the shooter. Noel gave her his contact information and soon thereafter left the country. When he returned, he had several messages from the investigator.

Noel testified that he spoke to the investigator twice, once during the summer (2015), and again, possibly in October 2015,

after he saw the photograph (of Alvarado) on television. Noel explained to the investigator, “I was watching the 6 o’clock news in my office, and it was in Univision. And I saw they posted the gentleman on the screen, and it was exactly the same guy that was doing the shooting, the exact face.” Noel testified that he did not tell the defense investigator that he called the police when he saw the news story, because the investigator did not interview him “regarding the situation.” Noel then testified that he probably told the investigator, but he did not recall. After Noel testified, the parties stipulated that Noel never told the defense investigator that he called the police after seeing Alvarado on TV news.

The prosecution submitted, without objection, a copy of a report prepared by District Attorney Investigator Hudson, regarding the recorded statement of the Bali Construction office manager, which set forth that Vicente Jr. had appeared at Bali Construction on April 20, 2015,⁵ asking for employment records or a letter showing that his brother, Michael Renteria was at the facility for a drug test on August 23, 2013, at 2:30 p.m. The office manager researched the company’s records and found that defendant had been sent to the drug testing facility on August 27, 2013.

The prosecutor also represented that on April 23, 2015, the day the verdict was rendered, former defense co-counsel Mendez, emailed a video showing someone named Luis telling Vicente Jr. that the real culprit was Alvarado, and that it was “messed up” that his brother was in custody for something he did not do.

⁵ Vicente Jr. began his testimony sometime between approximately 10:45 to 11:00 a.m. on April 20, 2015.

DISCUSSION

Defendant contends that the trial court abused its discretion in denying his motion for new trial on the ground of newly discovered evidence, resulting in a denial of his federal due process liberty interest. The trial court denied the motion after finding that the witnesses' testimony did not present newly discovered evidence.

As relevant here, section 1181 provides: "When a verdict has been rendered . . . , the court may, upon [defendant's] application, grant a new trial, in the following cases only: [¶] . . . [¶] 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. . . ."

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." [Citations.]' [Citation.] 'In addition, "the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable." [Citation.]' [Citation.]" (*People v. Howard* (2010) 51 Cal.4th 15, 43 (*Howard*)).

"To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial.' [Citation.] '[T]he trial court has broad discretion in ruling on a new trial motion . . . , and its 'ruling will be disturbed only for clear abuse of that discretion.' [Citation.] In addition,

‘[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.’ [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 308 (*Verdugo*)). It is the defendant’s burden to show a “manifest and unmistakable abuse of discretion in the trial court’s ruling [on the new trial motion].” (*Id.* at p. 309.)

The trial court denied the motion primarily upon the finding that the testimony of the witnesses did not present newly discovered evidence. Defendant contends that the trial court’s finding was erroneous for the following reasons: Alvarado did not make his admission to Loza until after the verdict; although there were rumors of Alvarado’s guilt prior to the verdict, rumors were not *admissible* evidence⁶; and, Hernandez and Orozco did not report Alvarado’s admission to the police before the September 2015 stabbing of Orozco.

It is clear that the trial court did not believe Loza, Hernandez, and Orozco. The court found it unbelievable that Alvarado would confess to “his baby momma, the baby momma’s sister, Loza. Everybody else. He’s singing like a bird about he is the one who did the shooting and [his ‘good buddy’ defendant] didn’t do it.” Also, the trial court did not believe that defendant’s mother waited until after the verdict to connect the shooting with the man who had given her his contact information within days of the shooting. Indeed, the court did not believe any of Noel’s testimony. As the court stated, “I’m sorry, counsel, but that

⁶ Defendant does not explain or cite authority for his suggestion that inadmissible evidence cannot be deemed to have been discovered. This appears to relate to the issue of diligence, factor No. 4, to be reached after a finding that the evidence was newly discovered, as suggested in *Howard, supra*, 51 Cal.4th at p. 43.

makes absolutely no sense to me. None whatsoever. None whatsoever.”

We must defer to the trial court’s credibility findings if supported by substantial evidence. (*Verdugo, supra*, 50 Cal.4th at p. 308.) Rather than attempting to show that the trial court’s credibility findings were not supported by substantial evidence, defendant ignores the issue.

Instead, defendant takes issue with the trial court’s finding that the testimony of Loza and Hernandez was not probative, based in part on the paucity of facts linking the shooting of August 23, 2013, to the shooting that Alvarado allegedly admitted committing. Defendant argues that the testimony was probative, which he demonstrates by summarizing those portions of the testimony of Loza, Orozco,⁷ and Hernandez which might support such a link, as well as the testimony of Noel that would corroborate their testimony. That a fact would be probative, if believed, begs the question whether it was or should have been believed. Demonstrating that the witnesses testified to facts establishing a link between the two shootings does not show that the court’s credibility finding was unsupported by substantial evidence.

Moreover, in arguing that the evidence was newly discovered, defendant ignores Loza’s admission that weeks before his May 2015 encounter with Alvarado, defendant’s sister Olivia had already told him that Alvarado was the actual shooter. Thus, Loza’s testimony supports the trial court’s finding that the evidence had been known to defendant or his family prior to the verdict.

⁷ The trial court found only that Loza and Hernandez did not sufficiently link the shootings, and expressly did not “count” Orozco.

Defendant also disregards the trial court's finding that the defense learned about Alvarado's involvement prior to the verdict from a video. The court explained: "It is not new information that this person was known because the video disclosed the day of the verdict, so it had to be in the possession of the defense prior to the verdict that someone else was saying that some other person did it, this Joey Alvarado."

As substantial evidence supports the trial court's finding that the witnesses were not credible, and defendant has failed to show otherwise, we reject defendant's contention that discredited witnesses established that the evidence was newly discovered.⁸ In any event, we would reject defendant's remaining contentions even if we assumed that the evidence was newly discovered.

Defendant contends that the testimony of Hernandez, Orozco, Loza, and Noel provided material evidence that contradicted the strongest evidence against defendant at trial, and that the prosecution case rested on weak identification evidence.

"Numerous cases hold that a motion for a new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant. [Citations.]" (*People v. Martinez* (1984) 36 Cal.3d 816, 823.) Defendant acknowledges this observation and relies on it to argue that the new evidence contradicted the strongest prosecution evidence. However, in furtherance of such argument, defendant instead summarizes the *weakest*, not the strongest evidence presented against defendant at trial. He concludes that

⁸ As the trial court's finding that the evidence was in fact discovered prior to the verdict, we need not reach defendant's argument regarding the parties' or counsel's diligence in its discovering.

because the new trial evidence contradicted weak identification evidence, the trial court should have granted the motion.

Defendant summarizes weak parts of the testimony of eyewitness Carlos, and minimizes her identification of defendant's photograph from a photographic lineup, by quoting only her testimony that "it looked like the guy that I saw." Carlos was a reticent witness, afraid to testify about what she saw, and who had previously run from the police who had arrived at her house to escort her to the preliminary hearing to give testimony. Her conflicting trial testimony certainly reflected her fear, but her identification of defendant was otherwise strong. She identified defendant in court at the preliminary hearing and at trial as the person she identified from the photographic lineup. At the preliminary hearing, Carlos testified that she was 100 percent sure that the photograph depicted the shooter. She said, "I'm never gonna forget that face." Carlos told Deputy Perez soon after the shooting that she had witnessed the shooting while standing in her front yard, which supported her initial estimate of having an unobstructed view just 27 feet from defendant's truck, rather than her reconsidered estimate of a 45-foot view from a barred and curtained window. She also told Deputy Perez that she would be able to identify the shooter, and never said she saw only half his face, as she did at trial. Finally, although she retracted her identification of the exhibit 16 photograph of defendant's truck at trial, she admitted that she identified it a few months after the shooting.

Next, defendant points out that Jose did not identify defendant in court at trial, claiming not to recognize defendant and not knowing who the shooter was. Defendant disregards Jose's testimony that he told officers that he would recognize the shooter if he saw him again, as well as Jose's testimony that his life would be in danger if he were to identify the shooter at trial.

Defendant also disregards Jose's identification of a photograph of defendant's truck as depicting the truck driven by the shooter.

Defendant emphasizes Juan's initial testimony that he went blind before seeing the shooter and identified him from hearsay descriptions. In so doing, defendant disregards Juan's later admission that his in-court identification of defendant was based upon his observation of the person in the truck at the time. Defendant also disregards Juan's identification of the photograph of defendant's truck (exh. 16) as the same truck driven by the shooter.

In sum, defendant's analysis shows only that the witnesses contradicted the prosecution's weak evidence, not its strongest. Moreover, the trial court did not believe the witnesses' testimony. As defendant himself argues, a third-party confession points to the defendant's innocence and can serve to undermine the prosecution's case *if credited*. (See *In re Branch* (1969) 70 Cal.2d 200, 215 [on habeas corpus].) As defendant did not show that the court's credibility findings were unsupported by substantial evidence, this contention must also fail.⁹

Finally we reject defendant's contention that the new evidence was such as to likely render a different result on retrial. (See *Howard, supra*, 51 Cal.4th at p. 43 [factor No. 4].) Defendant argues that a different result would be probable because it would contradict the prosecution's weak identification evidence. As discussed, however, there would remain the

⁹ Defendant argues at length that the evidence would be admissible as a hearsay exception, a statement against Alvarado's penal interest. We do not reach defendant's extensive argument on this point, as the trial court ultimately ruled that the hearsay exception was applicable, but found the testimony lacking in probative value and unlikely to be admitted on that basis.

prosecution's strong identification evidence. And although the trial court found that Orozco provided more specific facts connecting Alvarado's admitted shooting to the August 2013 shooting, her testimony was impeached by her recorded statement. Although Orozco claimed that Alvarado told her he committed the shooting alone, she then admitted that he had merely said that he was alone when he called. Further, Orozco admitted telling Detective Giles that Alvarado and defendant *together* saw the enemy, went to get a gun, and then returned to shoot them. Her claim that she misspoke because she had been given morphine was not supported by the recorded interview in which she sounded coherent while recounting defendant's part in the shooting. Any retrial would be just as likely to result in a finding that defendant was guilty, either directly or as an aider and abettor.

Further, defendant's alibi evidence would not support a finding that he was not with Alvarado at the time of the shooting, as it would again be shown to be false. Not only would the prosecution again prove that defendant's truck was not in the repair shop at the time, but it was also prepared to present the testimony of the Bali Construction office manager to prove the falsity of Vicente Jr.'s claim that defendant was with him that day.

Moreover, the assistance of defendant's brother and father in creating a false alibi suggests a family conspiracy. Such evidence, when considered with the role of defendant's sister in obtaining the testimony of Hernandez, Orozco, and defendant's good friend Loza, would cast doubt on their objectivity and credibility. Further, such evidence would cast doubt on Noel's two alleged encounters with defendant's mother. Finally, as the trial court observed, Noel's testimony made "absolutely no sense."

The trial court found that defendant did not meet his burden to demonstrate that the evidence was newly discovered, that it was probative, or that a different result would be probable on retrial. And he has not met his burden here to demonstrate that the trial court abused its discretion. As there appears no reasonable probability of a different result on retrial, the court's ruling did not affect defendant's federal due process liberty interest.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.